RECORD AND BRIEFS

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No. 16-349

IN THE

Supreme Court of the United States

RICKY HENSON, IAN MATTHEW GLOVER, KAREN PACOULOUTE, F/K/A KAREN WELCOME KUTEYI, AND PAULETTE HOUSE,

Petitioners,

v.

SANTANDER CONSUMER USA INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

REPLY BRIEF OF PETITIONERS 1

I. The Definition Of "Debt Collector" Encompasses Purchasers Of Defaulted Debt. 3

A. "Debts Owed Or Due Another" Can Refer To Debts Originated By Another. 3

B. Only Petitioners' Interpretation Can Be Reconciled With Congress's Use Of The Identical Language Elsewhere In The Same Definition. 6

1. Clause (F)(iv) And Secured Commercial Creditors 8

2. Clause (F)(iii) And Those Who "Obtain" A Debt Before Default 10

C. Respondent's Other Textual Arguments Are Unpersuasive. 13

1. The "Asserted To Be" Clause Does Not Compel Respondent's Reading 13

2. Clause (F)(ii) Makes Perfect Sense Under Petitioners' Interpretation 14

3. The "Creditor" Definition Does Not Help Respondent. 14

II. Respondent's Interpretation Is Inconsistent With The Act's Overall Structure And Scheme. 15

A. Purchasers Of Defaulted Debt Are Materially Indistinguishable From

Covered Servicers Assigned Defaulted Debt..... 15

B. Respondent's Interpretation Yields An Irrational Patchwork Of Coverage Congress Could Not Have Intended. 17

III. Respondent's Interpretation Cannot Be Reconciled With The Statute's Purposes..... 18

IV. Purchasers Of Defaulted Debt Are Debt Collectors At Least When They Regularly Service Others' Loans. 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Alibrandi v. Fin. Outsourcing Servs., Inc.,
333 F.3d 82 (2d Cir. 2003) 12

Bank of Waunakee v. Rochester Cheese Sales, Inc.,
906 F.2d 1185 (7th Cir. 1990) 9

Bridge v. Ocwen Fed. Bank, FSB,
681 F.3d 355 (6th Cir. 2012) 14

Kirtsaeng v. John Wiley & Sons, Inc.,
133 S. Ct. 1351 (2013) 12

Loughrin v. United States,
134 S. Ct. 2384 (2014) 6

McCarthy v. Bronson,
500 U.S. 136 (1991) 7

Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of Interior,
526 U.S. 86 (1999) 7

Ohio v. Robinette,
519 U.S. 33 (1996) 22

Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund,
135 S. Ct. 1318 (2015) 24

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 8

Scialabba v. Cuellar de Osorio,
134 S. Ct. 2191 (2014) 8

Small v. United States,
544 U.S. 385 (2005) 7

Yates v. United States,
135 S. Ct. 1074 (2015) 7

Statutes

Fair Debt Collection Practices Act,
15 U.S.C. § 1692 *et seq.* ..... passim
15 U.S.C. § 1692(b) 21
15 U.S.C. § 1692a(4) 5
15 U.S.C. § 1692a(5) 11
15 U.S.C. § 1692a(6)(F) 7, 9, 11, 18
15 U.S.C. § 1692a(6)(F)(ii) 14, 20
15 U.S.C. § 1692a(6)(F)(iii) ..... passim
15 U.S.C. § 1692a(6)(F)(iv) 8, 9, 10, 11
15 U.S.C. § 1692*l*(a) 22
15 U.S.C. § 1692*l*(b)(1) 16

Other Authorities

RICHARD F. DUNCAN ET AL., LAW AND PRACTICE OF SECURED TRANSACTIONS: WORKING WITH ARTICLE 9 (2017) 10

Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry (Jan. 2013) 16, 19, 21

Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES MAG. (Aug. 15, 2014), https://nyti.ms/2jRQHU6 16

Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41 (2015) 13

S. Ct. R. 15.2 24

U.C.C. § 9-404 9

U.C.C. § 9-406(a) 9

U.C.C. § 9-406(c) 9
U.C.C. § 9-607 cmt. 4 10
U.C.C. § 9-607(a) 9
U.C.C. § 9-608(a)(1)(B) 9
U.C.C. § 9-608(a)(4) 9
JEFFREY J. WONG ET AL., COMMERCIAL FINANCE GUIDE 10

REPLY BRIEF OF PETITIONERS

Santander insists that by using the phrase "debts owed or due another," Congress unambiguously excluded debt buyers from the "regularly collects" definition of a "debt collector" in the Fair Debt Collection Practices Act (FDCPA). Respondent does not seriously claim that Congress actually foresaw those words having that effect. Indeed, its brief goes a long way toward showing why this language was not designed to exclude debt buyers. Respondent explains that the "regularly collects" definition was added to "ensure that debt collectors do not escape the reach of the statute simply by having a different 'principal purpose.'" Resp. Br. 38. But simply adding coverage of those who "regularly collect" debts would have swept in banks and other credit originators collecting on their own loans. The "owed or due another" language was added to address that concern. *See id.* There is no indication that Congress intended the phrase also to exclude those who participated in a debt buying industry that, respondent acknowledges, "did not emerge until after the statute's enactment." *Id.* 39.

Instead, respondent suggests that the exclusion of debt buyers is the unavoidable consequence of the language Congress selected to solve a different problem. *See id.* 29. That is wrong for two related reasons. First, as our opening brief demonstrated, the phrase "owed or due another," even read in isolation, does not compel respondent's interpretation. Second, even though the debt buying industry had not yet emerged at the time of enactment, debt buyers are nothing more than a particular kind of debt assignee. And Congress *did*

specifically think about how to treat assignees of debt originated by others. It provided exceptions from the general "debt collector" definition for some, but not all, assignees. Those exceptions would be unnecessary, and internally incoherent, if assignees were already excluded because they collect debts "owed or due" only themselves within the meaning of the statute. Respondent's efforts to find some other function for those exceptions are unconvincing. At the very least, its view requires the Court to give the language of the exceptions a "decidedly unnatural interpretation." *Id.* 12.

In addition to its substantial textual problems, respondent's interpretation creates an irrational pattern of coverage Congress could not have intended. Santander does not dispute that it was a debt collector subject to the Act when it was hired to service petitioners' defaulted debt. Moreover, it conspicuously declines to contest petitioners' showing that the Act continued to apply after Santander bought the debts, so long as it also regularly collected debts for others (as it has told the Securities and Exchange Commission it does). *See id.* 43-44; *infra* § IV. At the same time, respondent seeks to assure the Court that a great many other purchasers of defaulted debt are covered under the "principal purpose" definition. Resp. Br. 41-42. It insists only that a debt purchaser sufficiently diversified to avoid regulation under the "principal purpose" definition, yet not so diversified as to be servicing others debts, is unambiguously outside the Act.

Respondent cannot explain why Congress would have intended such a hodge-podge of a statute. It does not identify anything that happened when it

purchased petitioners' debt that would have been relevant to the reasons Congress had for including or excluding particular entities from FDCPA coverage. Nor can it identify any reason why Congress would have intended to regulate Santander's collection of purchased debt so long as it continued to service debt for others, but not a minute longer.

In the end, the FDCPA is not a model of drafting precision. No one is able to offer the Court an interpretation which gives every term and provision its most natural meaning. But the interpretation adopted by the majority of circuits and the agencies that administer the statute offers by far the best reconciliation of the various provisions of the text, the rationale driving Congress's decision about the statute's scope, and the Act's underlying purposes.

I. The Definition Of "Debt Collector" Encompasses Purchasers Of Defaulted Debt.

Although respondent offers a plausible interpretation of the phrase "debts owed or due another" standing in isolation, the broader text of the "debt collector" definition, read as a whole, is best understood to encompass companies like Santander collecting purchased debt originated by others.

A. "Debts Owed Or Due Another" Can Refer To Debts Originated By Another.

Our opening brief demonstrated that as a matter of common usage, the phrase "debts owed or due another" is ambiguous. It could mean "debts *that are*

owed or *are* due another" or it could mean "debts *that were* owed or *are* due another," or some other permutation of these possibilities.[1]

1. Respondent's principal response is that Congress removed any ambiguity by making "debts owed or due another" the direct object of present-tense transitive verbs ("collects" and "attempts to collect"). But there is no rule of grammar to that effect, as can be easily demonstrated by comparing the statutory text to a few examples:

a. "[a] person . . . who regularly collects . . . debts owed . . . another." 15 U.S.C. § 1692a(6).

b. "a person who regularly collects *debts created* by another."

c. "a person who regularly collects *debts owed or owing* another."

d. "a library that lists *books banned* by its school board."

e. "an applicant who discloses every *debt owed* a foreign creditor."

f. "a person who regularly visits *homes owned* by celebrities."

In example (b), although the verb is in the present tense, the direct object phrase "debts created by another" necessarily refers to debts created in the past. In example (c), context dictates that "owed" must refer to the past, even though the "collects" is in

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[1] It is also possible to speak of an assigned debt as still presently "owed" the originator. Petr. Br. 27-28.

the present tense.[2] Even without similar contextual cues, example (d) could easily refer to books that were previously banned but no longer are, as might happen if the list were part of an exhibit about censorship. Verb tense fails to dictate the meaning of the other examples as well.

Respondent says that such examples use language "imprecisely." Resp. Br. 27, 28. But that's the point. The examples duplicate the imprecision of the statutory language. Because they are ambiguous, it is no surprise that respondent can offer suggestions for rephrasing such examples, and the statutory text, in ways that more clearly direct the reader to an earlier time frame. *Id.* 18, 26-28. Congress could have referred to "debts *that had been* owed or *are* due another," as respondent suggests. *Id.* 26. But it also could have referred to "debts *that are* owed or due" another. *See* 15 U.S.C. § 1692a(4) (definition of "creditor" referring to a person to whom a "debt *is* owed" (emphasis added)). The question is which more specific formulation would Congress have chosen? Grammar alone does not provide the answer.

Respondent also accuses petitioners of "packing their hypothetical with contrary contextual cues." Resp. Br. 27. But as shown above, even without such context, grammar does not dictate respondent's result. Moreover, the point of the examples is to

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[2] If the example seems awkwardly worded, it is because "owing to" is somewhat archaic, not because the sentence is ungrammatical. One might avoid the awkwardness be changing "owed or *owing to* another" to, say, "owed or *due* another."

illustrate that the phrase "debts owed . . . another" is *capable* of referring to a debt previously owed another, and that this can be the *best* interpretation in the right context. The point of the rest of our brief was that the statute provides that context in this case.

2. Respondent claims that it would be "decidedly unnatural" for the phrase "owed or due another" to refer to different time frames. Resp. Br. 12. But there would be nothing unnatural, for example, in Congress targeting debts "owed or owing another" to ensure broad coverage. That is the effect of the language it chose.

Nor is it unnatural for two different words, separated by the disjunctive "or," to have two different meanings and functions in a statutory provision. *See, e.g.*, *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (words connected by "or" almost always "are to be given separate meanings" (citation omitted)). It is respondent who asks this Court to reach the unnatural conclusion that "owed" and "due" are completely duplicative. Respondent observes that a debt may be "owed" but not yet "due," Resp. Br. 23 n.6, yet offers no explanation of how a debt collector could ever be collecting a debt that is presently owed, but not yet due, without at least asserting that the debt is presently "due."

B. Only Petitioners' Interpretation Can Be Reconciled With Congress's Use Of The Identical Language Elsewhere In The Same Definition.

The best textual cue that respondent's interpretation is not correct is that it cannot be

reconciled with Congress's use of the identical language in Clause (F) of the "debt collector" definition. Petr. Br. § II.B.

Examining how the same language is used in the same definition does not amount to "reason[ing] backward from exceptions." Resp. Br. 36. Respondent acknowledges that the FDCPA's exceptions use the exact same language as the principal definition, and that both uses must be given the same meaning. Resp. Br. 20. The Court must therefore decide which interpretation best suits *both* uses. Santander's request that the Court stop reading its brief before it even addresses Clause (F), *id.* 24, defies settled principles of statutory construction. "Whether the language of a statute is plain or ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of Interior*, 526 U.S. 86, 101 (1999) (citation omitted). Even when an interpretation of a phrase "may be plausible in the abstract, . . . it [can] ultimately [be] inconsistent with both the text and context of the statute as a whole." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016).

Adhering to those principles, this Court has regularly decided that what at first appears the "most natural reading" of statutory language is, in fact, incorrect given the "language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (citation omitted); *see, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (holding that a fish is not a "tangible object"); *Small v. United States*, 544 U.S. 385, 388-89 (2005) ("any

court" does not include foreign courts); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (ban on retaliation against an "employee" protects a former employee).

Accordingly, while it makes sense to "[b]egin by reading the statute from the top," the Court must "read on," even if respondent would prefer that it did not. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014).

1. Clause (F)(iv) And Secured Commercial Creditors

Clause (F)(iv) provides an exemption for a person collecting a debt "owed or due another" to the extent such activity

> concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692a(6)(F)(iv).

In our opening brief, we explained that the secured party targeted by this exception collects a consumer debt by foreclosing on a security interest in debts owed its commercial borrower, after which it is collecting on its own account, the same as any debt buyer. Petr. Br. 31-32. Santander responds that the clause is aimed at protecting a secured creditor when it "'obtains' the [consumer] debt by holding it as collateral without acquiring full ownership." Resp. Br. 33. That argument fails for two fundamental reasons.

First, a lender does not "obtain" consumer debt used as collateral for a commercial loan. Instead, it simply gains a security interest in the debts, an

interest that provides no more than an inchoate right to collect the debts if the loan is defaulted and the security interest foreclosed upon. *See* U.C.C. §§ 9-404, 9-406(a), 9-607(a) (AM. LAW INST. & UNIF. LAW COMM'N 2010).[3] Just as a contractor does not "obtain" a house when it puts a mechanic's lien on the property, a commercial lender does not "obtain" consumer debt simply by having a security interest in it.

Second, Clause (F)(iv) does not apply in any event unless the secured creditor is "collecting or attempting to collect" the obtained consumer debt. 15 U.S.C. § 1692a(6)(F). And a creditor who is simply holding a debt as collateral will not be collecting on it. The creditor collects debt from consumers only after default, by providing the consumer "a notification . . . that the amount due or to become due has been assigned and that the payment is to be made to the assignee." U.C.C. § 9-406(a); *see also id.* § 9-406(c) ("[I]f requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made."). At that point, the secured creditor is in the same position as a debt buyer, exercising an assignment in order to collect the funds on its own account. *Id.* § 9-608(a)(1)(B), (a)(4); *see also, e.g.*, *Bank of Waunakee v. Rochester*

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[3] *See also, e.g.*, *Friedman v. Textron Fin. Corp.*, No. 96-C-7983, 1997 WL 467175 (N.D. Ill. Aug. 12, 1997); Teri Dobbins Baxter, *Secured Party's Liability for Collection or Enforcement of Account Debtor's Obligation When Secured Party Has No Right of Recourse Against the Debtor*, 63 CONSUMER FIN. L.Q. REP. 225, 225-26 (2009).

Cheese Sales, Inc., 906 F.2d 1185, 1190 (7th Cir. 1990) (recognizing that "a secured party who exercises his rights to collect on an 'assignor's' accounts receivable [is] an assignee").[4]

Thus, we can think of no situation, and Santander identifies none, in which a secured commercial creditor would ever need the Clause (F)(iv) exception under respondent's interpretation of the main definition, because a secured commercial creditor would never be collecting a debt "owed or due another" as respondent interprets that phrase.

2. *Clause (F)(iii) And Those Who "Obtain" A Debt Before Default*

Clause (F)(iii) presents respondent a similar dilemma. *See* Petr. Br. 29-31. Santander responds again by insisting on an unnatural interpretation of what it means to "obtain" a debt which, even if accepted, does not solve its problem.

Respondent argues that the Clause (F)(iii) exception is directed at debt servicers who "obtain" a debt by entering into a contract to collect a debt on behalf of the creditor. Resp. Br. 31-32. Even if that were right, it is not enough for respondent to convince the Court that Clause (F)(iii) *includes*

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[4] A commercial borrower may also assign the creditor its accounts at the outset. *See* U.C.C. § 9-607 cmt. 4. But when that happens, the secured creditor will, again, be collecting the consumer debt on its own account, crediting the proceeds against the commercial loan. *See, e.g.*, RICHARD F. DUNCAN ET AL., LAW AND PRACTICE OF SECURED TRANSACTIONS: WORKING WITH ARTICLE 9 § 1.06 (2017); 1 JEFFREY J. WONG ET AL., COMMERCIAL FINANCE GUIDE § 6.02.

servicers who have nothing more than a contract to collect a debt; to avoid our objection, respondent must convince the Court that Clause (F)(iii) includes *only* such contract servicers and *excludes* servicers who are collecting on the basis of an actual assignment. Otherwise, if respondent admits that Congress intended the provision to apply to servicers with assignments, then it has to explain how a servicer with an assignment can be collecting a debt "owed or due another" (as required for Clause (F) to apply), yet a debt purchaser, who has also obtained a debt through assignment, is *not* collecting a debt "owed or due another."

Although we emphasized this point in our brief, Petr. Br. 46, respondent offers no response. It does not deny that the exception covers servicers with assignments. Indeed, how could it? A servicer much more obviously "obtains" a debt through assignment than through a contract. In addition, any claim that "obtain" has a narrower meaning would run headlong into the fact that the same word in Clause (F)(iv) *must* include secured creditors collecting on the basis of an assignment, as that is the only means through which secured creditors will ever collect consumer debt. *See supra* § I.B.1.

In any event, respondent's interpretation of "obtained" is strained, to say the least. While it may be that "obtain" can, in general, "signify mere possession short of full ownership," Resp. Br. 31, respondent does not explain how it makes sense to speak of merely "possessing" a debt. A debt is an "obligation of a consumer to pay money." 15 U.S.C. § 1692a(5). It is not a physical thing that can be merely possessed without owning it, like a leased

film. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1360-61 (2013). Indeed, if "possessing" and "owning" a debt provide exactly the same right – *i.e.*, the right to demand payment on the debt – and nothing else, it is hard to see how respondent's distinction helps it.

Respondent's only support for its reading is a citation to the legislative history (an odd source of authority for a party that has spent most of its brief insisting the case can be resolved on the plain language). *See* Resp. Br. 32. But the cited statement in the Senate Report does not say that the servicers it had in mind were collecting on a contract rather than through an assignment. And the *text* of the statute suggests that Congress intended to include servicers who obtain debts through assignment. *See* Petr. Br. 30 (discussing reference to servicers with assignments in "creditor" definition).

At the same time, interpreting Clause (F)(iii) to cover those with nothing more than a contract to collect a debt could open a gaping hole in the FDCPA's coverage. Respondent does not deny that under its interpretation, ordinary third-party debt collectors "obtain" every debt they are hired to collect. *See* Petr. Br. 45. As a result, they would be excluded from FDCPA coverage so long as they are hired to collect the debt before it goes into default. Importantly, delinquent debts are often sent out for collection before they fall into default. *See Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 (2d Cir. 2003) (noting that while the statute does not define "default," the courts "have repeatedly distinguished between a debt that is in default and a debt that is merely" delinquent, such that "all agree

that default does not occur until well after a debt becomes outstanding"); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41, 49-52 (2015) (describing collection practices).

At the same time, particularly in the credit card industry, debts are generally sold not long after being declared in default. *See id.* at 52. On respondent's interpretation, then, it is possible that *none* of the efforts to collect some credit card debts would be subject to the FDPCA: the originator's attempts are obviously not covered; a third-party debt collector's initial attempts to collect the merely delinquent account will be shielded by Clause (F)(iii); and once the account is declared in default and sold to a debt buyer like Santander, the buyer's attempts would be excluded under respondent's interpretation of "owed or due another."

C. Respondent's Other Textual Arguments Are Unpersuasive.

Respondent points to a handful of other textual cues that it says establish its position as unambiguously correct, but none of them do.

1. The "Asserted To Be" Clause Does Not Compel Respondent's Reading.

Respondent points out that the main "debt collector" definition "covers not just the collection of debts 'owed or due * * * another,' but also the collection of debts '*asserted to be* owed or due another.'" Resp. Br. 18 (emphasis in original).

Respondent reads too much into too little. The function of this clause is to ensure coverage of debt collectors who are dunning the wrong person, or

seeking to collect a debt that has already been paid or extinguished in bankruptcy. *See, e.g.*, *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 361 (6th Cir. 2012). The focus thus is on the assertion that the debt is "owed or due," not that it is owed or due "another." It was unnecessary for Congress to use an unwieldy formulation like "asserted to be, or have been, owed or due another" to achieve the clause's purpose: regardless of what they tell consumers, assignees collecting their own debts will always be covered by the main clause, as they will always be "attempting to collect debts owed or due . . . another," as we interpret the phrase, because the underlying loan will have been originated by someone else.

2. Clause (F)(ii) Makes Perfect Sense Under Petitioners' Interpretation.

Respondent says that an interpretation "under which the assessment whether debts are 'owed or due * * * another' is made as of the time of origination" renders Clause (F)(ii)'s exception for debt originators nonsensical. Resp. Br. 20-21. But we do not argue that *both* "owed" and "due" refer to the time of origination, only that "owed" can. *See id.* 24-25 (acknowledging that position). On that understanding, Clause (F)(ii) has the perfectly sensible function of exempting an originator that sold a debt but continues to service the loan. *See* Petr. Brief. 33 n.36.

3. The "Creditor" Definition Does Not Help Respondent.

In its merits brief, respondent abandons the suggestion, raised in its opposition, that it is exempt from FDCPA coverage so long as it qualifies as a

"creditor." *See* Resp. Br. 34-35; BIO 21-22. It nonetheless argues that it would be "passing strange" for the "creditor" definition to refer to the entity to whom a debt presently *is* owed, yet the debt collector definition to refer to the entity to whom a debt *was* owed. Petr. Br. 19. But given that the two provisions use different language – "*is* owed" v. just "owed" – it is not surprising that they would have different meanings. Moreover, we have explained why Congress would want the creditor definition to refer to a different time frame, given the variety of purposes it serves in the statute. *Id.* 47-48.

II. Respondent's Interpretation Is Inconsistent With The Act's Overall Structure And Scheme.

Respondent's interpretation also cannot be reconciled with Congress's treatment of other similarly situated collectors of consumer debt and leaves an anomalous gap in coverage Congress could not have intended.

A. Purchasers Of Defaulted Debt Are Materially Indistinguishable From Covered Servicers Assigned Defaulted Debt.

Respondent does not dispute that Congress intended to regulate debt servicers who obtain defaulted debt on assignment. *See* Resp. Br. 32. Our opening brief asked the reasonable question why Congress would have intended to include servicers who are *given* an assignment of defaulted debt by their customers, yet exclude those who *purchase* an assignment of the same defaulted debt. After all, the only difference is in the financial arrangements

between the assignor and assignee, which has no obvious bearing on whether the debt is "owed or due another." *See* Petr. Br. 36.

Tellingly, respondent offers no meaningful response. It simply observes that Congress couldn't have had a specific intent about debt purchasers (because the industry did not yet exist) and then returns to its claim that the statutory language unambiguously excludes them. Resp. Br. 38-39.

Respondent *does* attempt to explain why Congress would have been unconcerned about consumer finance companies buying and collecting defaulted debt. *Id.* 38-39. But, of course, Santander asks for a rule that would exempt all debt purchasers, including hedge funds, law firms, and others who regularly collect defaulted debt from individuals with whom they have no interest in maintaining good relations.[5] In any event, Congress expressly contemplated enforcement against financial services companies. *See* 15 U.S.C. § 1692*l*(b)(1) (assigning to specific federal banking regulators responsibility for enforcing FDCPA against various financial institutions); Nat'l Consumer Law Center Br. 17-20.

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[5] *See, e.g.*, Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry 15 & n.73 (Jan. 2013) ("*Structure and Practices*"); Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES MAG. (Aug. 15, 2014), https://nyti.ms/2jRQHU6.

B. Respondent's Interpretation Yields An Irrational Patchwork Of Coverage Congress Could Not Have Intended.

On respondent's telling, Congress should have exempted all purchasers of defaulted debt, so long as they maintain other lines of business as well. After all, such entities are not the small independent debt collectors Congress had in mind, Resp. Br. 37, each has "a significant interest in maintaining good relationships" with consumers, *id.* 38, and could be deterred from buying defaulted debt if its collection efforts were subject to federal regulation, *id.* at 39. Yet, respondent ultimately does not dispute that under its interpretation, many regular collectors of purchased defaulted debt *are* subject to the FDCPA, even when collecting purchased debt on their own accounts.

That is, respondent insists that many debt buyers are covered by the "principal purpose" definition. *Id.* 41-42. And it does not contest petitioners' showing that the statute also covers a company (like Santander) that regularly services other companies' loans in addition to collecting purchased debt on its own account, even when it is collecting on defaulted debt it owns. *See* Petr. Br. 53-56; Resp. Br. 43-48 (refusing to defend the court of appeal's contrary holding, Pet. App. 19a).

That concession renders respondent's interpretation untenable. Santander offers no cogent explanation why Congress would have intended to exclude *only* the slice of the industry its interpretation actually exempts. Why would Congress be more suspicious of Santander than a hedge fund like Blackstone Group? Or put

differently, why would Congress feel the need to protect consumers from every debt buyer *except* one that regularly (but not principally) collects purchased defaulted debt while refraining from the regular servicing of others' loans? Respondent cannot say.

At the same time, respondent's interpretation creates inexplicable disparities in treatment between "principal purpose" and more diversified "regularly collects" purchasers of defaulted debt. In particular, respondent would deny "principal purpose" companies access to any of the Clause (F) exceptions when collecting purchased debt (because the exceptions apply only when one is collecting a debt "owed or due another"), including the exception for collecting debt obtained prior to default.

It is far more likely that Congress intended petitioners' construction, which results in coverage for *all* regular collectors of purchased debt and provides all debt buyers equal access to the Clause (F) exceptions.

III. Respondent's Interpretation Cannot Be Reconciled With The Statute's Purposes.

Respondent's attempts to reconcile its interpretation with the Act's purposes fail for other reasons as well.

1. Respondent says that some debt buyers have a general business reputation to maintain, which might constrain their collection activities. Resp. Br. 38. But that is true of any business falling under the "regularly collects" definition. Yet Congress plainly believed that general reputational interests were insufficient protection. Congress focused instead on whether a collector had an interest in maintaining a

good relationship with an *existing customer*. Petr. Br. 34-35.

2. Respondent tells the Court not to worry about leaving debt purchasers out of the "regularly collects" definition, because the worst of the lot will be covered by the "principal purpose" definition anyway. Resp. Br. 41-42.[6] There is no basis to believe Congress shared Santander's faith in companies that regularly collect debt, without it being their principal business. *See, e.g.*, Petr. Br. 51 (giving examples of abusive conduct by such entities); Jerome N. Frank Legal Services Org. Br. §§ I.A-I.B (same). The government agencies with the most direct knowledge of the industry certainly have not shared respondent's assessment: for more than twenty years, in both Democratic and Republican administrations, these agencies have construed the statute to encompass all who buy and collect defaulted debt. Petr. Br. 12-13; Nat'l Consumer Law Center Br. 24-28.[7]

Moreover, at the time of enactment, Congress's principal experience with collection of assigned debt

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[6] While we agree that debt purchasers can fall under the "principal purpose" definition, this Court has never so held and the conclusion could be contested. Unlike the independent debt collectors Congress most obviously had in mind, debt buyers do more than simply collect debts – they also put substantial effort into finding, evaluating, and buying debts, as well as repackaging and reselling debts. *See Structure and Practices*, *supra*, at 11, 19-22.

[7] Although the Acting Solicitor General has elected not to file a brief in this case, respondent points to nothing indicating the independent agencies that administer the FDCPA have changed their views. *See* Resp. Br. 42 n.12.

was through the debt servicing industry. Based on that experience, Congress decided to regulate servicers of defaulted debt, whether that was their principal purpose or merely a regular part of their business. Respondent fails to explain why Congress would have been less worried about purchasers of assignments than servicers with assignments.

3. Respondent next claims that applying the FDCPA to debt buyers would discourage debt buying, harming the secondary debt market. Resp. Br. 39. But Santander fails to explain why, if that is so, Congress subjected major portions of the debt buying industry to the Act, including some its largest participants. *See id.* 42.

In any event, petitioners' interpretation has been the law in many circuits for more than a decade, during which time debt buying has grown explosively. *See* Petr. Br. 8, 12. That is unsurprising. Applying the Act broadly avoids distorting the secondary debt market by leveling the playing field between debt buyers who are constrained by law or ethics to avoid abusive collection practices and those who would be left to their own devices on respondent's interpretation. Petr. Br. 40-42.

Santander's claim that our view would "expose respondent's entire business" to "FDCPA litigation," is also wrong. Resp. Br. 39. Clause (F)(ii) expressly excludes collection of debts Santander originated, while Clause (F)(iii) excludes any debt not in default when obtained. That leaves only debts Santander obtained while in default. Subjecting those collections to the FDCPA simply puts Santander in the same position as it was in when it was servicing

the same debts for CitiAuto Financial, and in the same position it all but admits it is in now, having purchased the debts but continued to regularly service loans for others. *See infra* § IV.

Nonetheless, if Santander wishes to avoid having to comply with the FDCPA it can simply refrain from buying or collecting defaulted consumer debt. The Chamber of Commerce cites no support of its claim that it is "difficult, if not impossible" for a bank to avoid buying defaulted debt in large portfolio purchases. Chamber Br. 13-14. In fact, such scrutiny of portfolios is routine in the debt buying industry. *See Structure and Practices*, *supra*, at 17-22 (describing how portfolios are structured by sellers and scrutinized in detail by potential buyers in order to decide what to pay).[8] At the very least, purchasers must give *some* scrutiny to particular accounts before attempting to collect on them. They can easily elect either to not collect a debt obtained after default (which often is not worth much anyway) or resell it to others.

Finally, respondent states that "an entity that is not subject to the FDCPA would hardly go unregulated if it engages in abusive practices." Resp. Br. 41 (citing statutes). But Congress enacted the FDCPA precisely because it concluded that "[e]xisting laws and procedures for redressing" abusive debt collection practices "are inadequate to protect consumers." 15 U.S.C. § 1692(b); States Br. § C;

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[8] The Court need not decide the FDCPA consequence of a company's merger or mere change in the ownership, which is far from obvious.

Public Counsel Br. § C. Congress thus specifically contemplated applying the Act to debt collectors (including financial institutions) *in addition* to other laws. *See supra*, at 16; *see also* 15 U.S.C. § 1692*l*(a) (authorizing Federal Trade Commission to enforce FDCPA as a *supplement* to powers under the Federal Trade Commission Act).

IV. Purchasers Of Defaulted Debt Are Debt Collectors At Least When They Regularly Service Others' Loans.

Even if this Court agrees with respondent's interpretation of "owed or due another," it should reverse because respondent does not dispute that the Fourth Circuit erred in rejecting petitioners' claim that Santander could nonetheless be covered by virtue of its regular collection of others' debts as a third-party servicer. *See* Petr. Br. § IV; Resp. Br. 43-44, 46-48 (refusing to defend Fourth Circuit's interpretation).

1. Whether purchasers of defaulted debt are debt collectors at least when they regularly service others' loans is a "predicate to an intelligent resolution of the question presented" and is "therefore fairly included therein." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (internal quotation marks and citation omitted).[9] Deciding whether Santander's construction of "owed or due another" is correct

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[9] While we did not address the question in the body of our petition, we did raise, and the Fourth Circuit decided, the question below. *See* Pet. App. 18a-19a.

requires examining the consequences of that interpretation for the way the statute would operate as a whole, including whether it excises only a discrete subset of debt purchasers in a manner that bears no sensible relation to the Act's underlying rationale and purposes.

At the same time, if the Court holds that purchased debt is not debt "owed or due another," providing an incomplete answer to the Question Presented risks giving lower courts the impression that collectors of purchased defaulted debt are *never* debt collectors, when the reality may be that most *are*.

Because the statute's application to debt purchasers who regularly service others' loans is clear on the face of the statute, uncontested, and an important part of answering the Question Presented by the petition, the Court should address the issue and, if necessary, reverse on the basis of its answer.

2. Having effectively conceded that it would qualify as a "debt collector" if it regularly serviced debts for others, respondent urges the Court to nonetheless affirm on the alternative ground that the Complaint inadequately alleges that third-party servicing was a "regular" part of its business. Resp. Br. 45-48.

That, however, is not an adequate ground for affirming dismissal with prejudice. Respondent does not dispute that, in fact, it "regularly" collects others' debts under any definition of that term, for good reason: it has represented to the SEC that third-party servicing is an $11.9 billion part of its business. *See* Petr. Br. 56 n.53. Accordingly, any pleading

deficiency should lead, at most, to dismissal without prejudice and an opportunity to replead. *See, e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Because the Fourth Circuit did not pass on respondent's pleading objection, the Court could remand the case to allow the court of appeals to address it in the first instance. *See, e.g.*, *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1333 (2015). But the Court could also reject it out of hand.[10] On its face, the Complaint alleges that Santander was a third-party servicer for the *Thomas* class members' loans. The docket for that case (before the same district court that heard this one) indicates that the *Thomas* class included about 3,000 members. Petr. Br. 55. Respondent has further represented to this Court that the *Thomas* members' loans were part of a larger portfolio of loans it was hired to service. Resp. Br. 7. Servicing that portfolio easily qualifies as a "regular" part of Santander's business under the authorities respondent cites. *See id.* 46. Finally, the Court can take judicial notice of the aforementioned SEC filing, which substantiates the Complaint's allegation that respondent is a covered debt collector. *See* Complaint ¶19-20 (JA 18-19).

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[10] Santander did not assert any such pleading deficiency in its brief in opposition, even though that would have provided a reason to deny certiorari under *any* construction of the Question Presented. *See* Resp. Br. 44. n.14; BIO 9-30. Accordingly, the Court may deem the objection waived. *See* S. Ct. R. 15.2.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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